No. 87-1235

In the Supreme Court of the United States

OCTOBER TERM, 1987

ORESTE ABBAMONTE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether evidence underlying a prior conviction for conspiracy to engage in a narcotics offense, in violation of 21 U.S.C. 846, may be introduced in a subsequent prosecution to establish the "in concert" element of the offense of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 831 F.2d 373.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1987, and a petition for rehearing was denied on November 30, 1987 (Pet. App. A25). The petition for a writ of certiorari was filed on January 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of operating a continuing criminal en-

terprise (CCE), in violation of 21 U.S.C. 848; one count of conspiring to distribute heroin and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846; and two counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to life imprisonment on the CCE charge and concurrent terms of 40 years' imprisonment on each of the other charges.

1. The evidence adduced at trial, as summarized in the opinion of the court of appeals (Pet. App. A6-A10), showed that petitioner supervised a large drug trafficking enterprise. On October 20, 1982, a Drug Enforcement Administration (DEA) undercover agent purchased three kilograms of heroin from petitioner and Joseph Delvecchio; the agent subsequently made arrangements to buy 17 more kilograms. Those arrangements led to the arrest of petitioner and Delvecchio, and the seizure of nine kilograms of heroin. While petitioner was being detained, following his arrest, in the Metropolitan Correctional Center in Manhattan, he continued to arrange drug transactions, together with Delvecchio and Angelo Amen, Richard Delvecchio, and Lorenzo DiChiara.

In 1983, petitioner was convicted on his guilty plea on a charge of conspiracy to distribute heroin and two substantive narcotics violations. Those convictions were based on petitioner's involvement in the two transactions with the undercover agent as well as his other narcotics activities in 1982 and early 1983, while he was in the Metropolitan Correctional Center. The court below observed that "[t]estimony by undercover and surveillance agents, as well as [petitioner's] guilty plea allocution, established that he supervised, managed, and organized Joseph Delvecchio during the two 1982 heroin transactions with the undercover agent." Pet. App. A7.

Petitioner was imprisoned following his 1983 convictions. The evidence showed that between 1984 and 1986,

while he was incarcerated in the federal penitentiary at Lewisburg, Pennsylvania, petitioner supervised and managed numerous persons in a heroin distribution enterprise. That operation was discovered when a defendant in an unrelated narcotics case informed DEA agents that Lawrence Jackson, a prison inmate, was coordinating heroin transactions from inside the prison. DEA undercover agent Charles Howard established contact with Jackson and, in December 1984, Jackson promised to put Howard in communication with petitioner's organization. In January 1985, acting on instructions from petitioner, Mark Deleonardis quoted heroin prices to Howard; Deleonardis subsequently indicated that petitioner had told him to provide Howard with "quality heroin." On February 7, 1985, Deleonardis sold 129 grams of heroin to Howard. Jackson called Howard three days later to report that Deleonardis was pleased with the deal. On February 14, 1985, Howard complained to Jackson about the quality of the heroin, and Jackson indicated that he would talk to petitioner about the problem. Pet. App. A7-A8.

In March 1985, Deleonardis told Howard that petitioner insisted that the next few heroin deals take place in New York rather than in Washington. Deleonardis subsequently sold heroin to Howard on three separate occasions. After the second transaction, Deleonardis explained that petitioner had agreed to give heroin to Howard on credit. After the third transaction, petitioner placed a call to Deleonardis, who assured petitioner that the deal had gone as planned. Pet. App. A8-A9.

Angelo Amen supplied the heroin that was sold to Howard on those three occasions. During the spring of 1985, however, petitioner expressed dissatisfaction with Amen's performance. In conversations with Deleonardis and Arnold Squitieri, petitioner suggested that Amen

would get a beating and would be "going to the * * * hospital" because he continued to deal with certain individuals despite petitioner's orders not to do so. On May 9, 1985, Michael Paradiso called Richard Romano to "take care of it," and during the next few days Romano and others waited outside Amen's apartment building. Amen did not appear, however, as he had apparently learned of the plan and gone into hiding. Pet. App. A9.

Another sale of heroin to Agent Howard was scheduled for August 15, 1985, but Deleonardis detected surveillance at the time and decided against completing the transaction. Deleonardis subsequently told petitioner that he would no longer deal with Howard. Paradiso then called Romano and instructed him to meet with Deleonardis. On the evening of August 15, petitioner informed Deleonardis that Romano would take care of Howard. Jackson later called Howard and indicated that someone else from petitioner's organization would do business with Howard. On September 6, 1986, while Deleonardis waited with Howard, Romano went to pick up 451 grams of heroin and delivered it to Howard. Pet. App. A9-A10.

2. The court of appeals affirmed petitioner's convictions in pertinent part.[1] In order to prove that petitioner engaged in a continuing criminal enterprise, the government was required to show that petitioner acted in concert with and supervised or managed five or more persons. See 21 U.S.C. 848(b)(2)(A). The court of appeals unanimously rejected petitioner's contention that his conviction should be reversed because the government improperly relied upon the facts underlying petitioner's prior conspiracy

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[1] The court " 'combine[d]' " petitioner's conspiracy conviction into his conviction for engaging in a continuing criminal enterprise (see Pet. App. A24).

conviction in establishing the "in concert" element of the continuing criminal enterprise offense (Pet. App. A16-A18).

The court observed that petitioner had conceded that he supervised four individuals; it found that "the historical evidence relating to [petitioner's] 1982-83 operations with Joseph Delvecchio" provided the proof that he supervised at least five persons (Pet. App. A16). It stated that "[e]ven if the Government were somehow precluded from using the 1983 conspiracy conviction to satisfy the 'in concert' element of section 848, it nevertheless could use his 1983 convictions for substantive offenses for this purpose" (*id.* at A17). The court reached that conclusion because it found that petitioner's substantive narcotics offenses and his CCE violation were separate offenses for purposes of double jeopardy analysis (*id.* at A17-A18).

The court stated that "[a]ny error in admitting the conspiracy conviction was necessarily harmless since evidence that [petitioner] organized, supervised, or managed Joseph Delvecchio during two 1982 heroin transactions also proved two substantive narcotics violations" (Pet. App. A17). The court further stated that "evidence in this case showed that the crimes to which [petitioner] pleaded guilty in 1983 were but a small part of the enterprise that operated from on or about June 1, 1981, to on or about August 26, 1986" (*ibid.*).

ARGUMENT

One element of the offense of engaging in a continuing criminal enterprise is proof that the defendant committed a continuing series of violations of the narcotics laws "in concert with five or more other persons with respect to whom [the defendant] occupies a position of organizer, a supervisory position, or any other position of management" (21 U.S.C. 848(b)(2)(A)). Petitioner's sole claim is

that the facts underlying his 1983 conspiracy conviction were improperly introduced into evidence in the present case to establish the "in concert" element of the CCE charge.

1. As a threshold matter, the issue raised by petitioner is not presented in this case. The court of appeals expressly declined to address the question whether the facts underlying a prior conspiracy conviction may be introduced to establish the "in concert" element in a subsequent CCE prosecution. Petitioner conceded that the evidence adduced at trial showed he acted in concert with four individuals—Mark Deleonardis, Richard Romano, Angelo Amen, and Richard Delvecchio. The court of appeals found that the evidence showed that petitioner also acted in concert with Joseph Delvecchio, but it did not base that conclusion on petitioner's 1983 conspiracy conviction. The court relied instead on the facts underlying petitioner's 1983 convictions for substantive offenses. It stated that "[a]ny error in admitting the conspiracy conviction was necessarily harmless since evidence that [petitioner] organized, supervised, or managed Joseph Delvecchio during two 1982 heroin transactions also proved two substantive narcotics violations" (Pet. App. A17). The court then concluded that "[s]ince this case involves substantive offenses and a CCE, evidence underlying [petitioner's] 1983 conviction involving his supervision of Delvecchio establishes the missing fifth person thereby permitting prosecution of [petitioner] for CCE" (*id.* at A18). Since the court did not decide whether the evidence underlying a prior conspiracy conviction may be admitted in a subsequent CCE prosecution, the legal point that petitioner seeks to raise is not presented in this case.[2]

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[2] Petitioner himself distinguishes (Pet. 6) between a prior substantive conviction and a prior conspiracy conviction. He appears to limit the scope of his argument to the use of evidence underlying a prior conspiracy offense.

Even without any of the proof relating to the 1982-1983 events, there was ample evidence to satisfy the "in concert" requirement, because the jury could have found that petitioner supervised Lawrence Jackson. As the court of appeals' opinion shows (Pet. App. A7-A8), Jackson was one of the key individuals in petitioner's organization. He placed Agent Howard in contact with petitioner's heroin network, and he acted as an intermediary between petitioner and Howard on questions concerning heroin quality and seller contacts. The evidence thus demonstrated that petitioner satisfied the "in concert" element by supervising at least five persons several years after the period covered by the 1983 conspiracy conviction.[3]

2. In any event, petitioner's suggestion that the Double Jeopardy Clause barred the admission into evidence of the facts underlying his 1983 conspiracy conviction is without merit. Petitioner's claim is essentially indistinguishable from the argument rejected by this Court in *Garrett* v. *United States*, 471 U.S. 773 (1985).

Garrett was a CCE prosecution; one element of that offense is proof that the defendant engaged in a "continuing series of [narcotics] violations," commonly termed predicate offenses (21 U.S.C. 848(b)). The defendant in *Garrett* had previously been convicted on a charge of importing marijuana and, as part of its proof of the predicate offenses, the government introduced evidence of the facts underlying that prior conviction. This Court held

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[3] The government's brief in the court of appeals showed that petitioner supervised, managed, or organized other persons as well. Thus, Angelo Meli was actively involved in helping petitioner secure narcotics at the request of Michael Paradiso. And Michael Deleonardis, Jr., the brother of Mark Deleonardis, aided and abetted the sale of heroin and followed petitioner's instructions by passing a message from petitioner to Mark Deleonardis. Gov't C.A. Br. 34-36.

that the introduction of that evidence did not violate the Double Jeopardy Clause. The Court first concluded that CCE is a separate offense from other drug offenses (471 U.S. at 784). It next held that Congress did not intend CCE to be a substitute for other narcotics offenses, and that Congress intended to "permit prosecution for CCE in addition to prosecution for the predicate offenses" (*id.* at 785). Finally, the Court concluded that Congress did not intend that the government be forced to choose between prosecuting a defendant on a predicate offense and lodging a CCE charge against the defendant (*id.* at 785-786):

> ~~[I]n~~ many cases the Government would catch a drug dealer for one offense before it was aware of or had the evidence to make a case for other drug offenses he had committed or in the future would commit. The Government would then be forced to choose between prosecuting the dealer on the offense of which it could prove him guilty or releasing him with the idea that he would continue his drug-dealing activities so that the Government might catch him twice more and then be able to prosecute him on the CCE offense. Such a situation is absurd and clearly not what Congress intended.

Applying these determinations to the facts of *Garrett*, the Court concluded that the Double Jeopardy Clause did not bar introduction of the evidence underlying the prior conviction. The Court observed that the CCE charge alleged a continuing criminal enterprise spanning more than five and one-half years while the drug importation charge related to acts occurring on several single days during two of those years. The Court emphasized that the CCE was alleged to have continued even after the return of the indictment on the importation charge. 471 U.S. at 788-789, 791.

The effect of barring the use of evidence underlying the prior conviction, the Court noted, would be to require the government to defer indicting a defendant on a predicate offense until it was ready to lodge a CCE charge against the defendant. Citing the fact that the CCE continued even after the indictment on the importation charge, the Court refused to tie the government's hands in that manner. As the Court put it, "[o]ne who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting" (471 U.S. at 790).[4]

This case involves the "in concert" element of the CCE offense rather than the predicate violation element, but the rationale of *Garrett* applies equally to either element. Barring the government from using the prior conviction as evidence to prove the "in concert" element would impose a considerable disincentive upon the bringing of narcotics charges prior to indictment on a CCE charge. The government would have to weigh the possibility that, by indicting the defendant on a conspiracy charge, it was giving up any possibility of obtaining a conviction on a CCE charge. In addition, here, as in *Garrett*, the CCE charge included numerous offenses distinct from the 1983 conspiracy conviction; the CCE cannot in any way be seen as based upon the same conspiracy as the 1983 conviction. And, most significantly, the CCE was alleged to have lasted several years after the date upon which petitioner was convicted

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[4] Although *Garrett* itself addressed the use of a prior conviction on a substantive charge as a predicate offense in a subsequent CCE prosecution, the courts of appeals have applied *Garrett* to prior conspiracy convictions, holding that proof of such convictions may be used to satisfy the predicate offense requirement. See, *e.g.*, *United States* v. *Fernandez*, 822 F.2d 382, 384-385 (3d Cir. 1987), cert. denied, No. 87-346 (Nov. 30, 1987); *United States* v. *Young*, 745 F.2d 733, 750 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985).

on the conspiracy charge. For these reasons, admission of the facts underlying the 1983 conviction did not violate the Double Jeopardy Clause.[5]

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[5] Petitioner contends (Pet. 4-6) that the decision below conflicts with *United States* v. *Stricklin*, 591 F.2d 1112 (5th Cir.), cert. denied, 444 U.S. 963 (1979), and *United States* v. *Boldin*, 772 F.2d 719 (11th Cir. 1985), because the courts in those cases indicated that the facts underlying a prior conspiracy conviction could not be used to establish the "in concert" element of a CCE charge. There is no such conflict because, as we have discussed, the court below did not decide whether the evidence underlying a prior conspiracy conviction may be introduced on that basis; it held that the evidence underlying a prior *substantive* conviction could be used to satisfy the "in concert" requirement. Both *Stricklin* and *Boldin* are expressly limited to prior conspiracy convictions. See 772 F.2d at 731-732; 591 F.2d at 1123. Finally, even if the court below had held that the evidence underlying the prior conspiracy conviction was admissible, there would still be no clear conflict. The opinions in *Stricklin* and *Boldin* indicate that there might not be a double jeopardy violation if the CCE charge were not coterminous with the conspiracy proved in the prior case. 772 F.2d at 731; 591 F.2d at 1123. Here, as we have shown, the CCE was much broader than the conspiracy that resulted in the 1983 conviction. Accordingly, even under the rule discussed in *Stricklin* and *Boldin*, the evidence underlying petitioner's prior conspiracy conviction may have been admissible.

Petitioner also relies (Pet. 6-7) upon *Jeffers* v. *United States*, 432 U.S. 137 (1977). In *Jeffers*, a plurality of this Court found that a defendant in some circumstances may not receive cumulative punishment for a CCE conviction and a drug conspiracy conviction. Petitioner does not argue that *Jeffers* itself holds, or even indicates, that the facts underlying a prior conspiracy conviction may not be used to establish the "in concert" element of a subsequent CCE charge. Because *Jeffers* is limited to the question of cumulative punishment in the context of CCE and conspiracy charges of virtually identical scope, petitioner could not make such an argument. We submit that the Court's analysis in *Garrett* establishes that the prior conspiracy conviction may be used to prove the "in concert" element of the CCE offense, and that nothing in *Jeffers* is to the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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